RAVEEN RAI RATTI B SATIAPAL & ANOR v. ARBAIYAH HUSSIN

HIGH COURT MALAYA, IPOH
NOORIN BADARUDDIN JC
[CIVIL APPEAL NO: 11 BNCVC-14-02-2015]
20 AUGUST 2015

CIVIL PROCEDURE: *Striking out – Application for – Amendments to statement of claim to include appellants as parties to suit – Cause of action accrued on date of incident – Whether claim time barred – Alternative claim from same cause of action against different defendants – Whether an attempt to circumvent limitation – Whether respondent rebutted fundamental issue relating to limitation*

CIVIL PROCEDURE: *Cause of action – Alternative claim – Whether inserting alternative cause of action in same writ a wrong mode – Whether must be pursued in fresh action – Whether cause of action accrued on different grounds and arose on a different date*

CIVIL PROCEDURE: *Appeal – Notice of appeal – Whether conformed to statutory form provided by rules of court – Whether should expressly state question of law – Whether appeal filed in accordance with s. 28(1) of Courts of Judicature Act 1964*

The respondent filed a civil action ('the suit') in the Magistrate Court against the first and second defendants for special damages suffered by her in an accident between the respondent's motorcar and the first defendant's motorcar. The special damages claimed was for the sum of RM6,168. Thereafter, the respondent amended her statement of claim to include the appellants as parties to the suit and they were then named as the third and fourth defendants, and in the alternative prayed for the sum of RM1,942 against the appellants being the settlement sum received by the appellants from the insurance company which insured the first defendant. The appellant filed an O. 18 r. 19(a)-(d) of the Rules of the High Court 1980 application to strike out the respondent's claim on the grounds that when the amendments were made to include the appellants as parties to the suit, the limitation period of six years had set in since the date of accident which had occurred on 17 June 2008. The Magistrate struck out part of the respondent's claim *ie* the prayer for the sum of RM6,168 being the claim for special damages arising from the accident on 17 June 2008 on the grounds that the claim was time barred as the six year limitation period had expired on 16 April 2014. Nonetheless, the alternative claim by the respondent for the settlement sum of RM1,942 received from the insurance company by the appellants was allowed. The appellants appealed against the said decision. The respondent raised an objection on the ground that the appeal was not filed in accordance with s. 28(1) of the Courts of Judicature Act 1964 ('the

A CJA'). The respondent contended that the appellants had failed to identify any points of law or provisions of laws which they were relying on in the notice of appeal filed before this court.

Held (allowing appeal):

B **(1)** Section 28(1) of the CJA did not say that the notice of appeal should expressly state the question of law. The notice of appeal by the appellants had conformed to the statutory form provided by the rules of court. The respondent was not prejudiced in any way as she could not deny the fact that limitation was the sole issue of the matter in the lower court and that the decision by the Magistrate was premised on the same C ground. From the appellants' statement of defence, the Limitation Act 1953 was specifically pleaded. Thus, the defence of limitation was properly and sufficiently pleaded by the appellants. (paras 17, 20 & 24)

(2) The respondent amended her claim on 22 September 2014 and the cause D of action arose from the date the accident occurred on 17 June 2008. Since the cause of action arose on 17 June 2008, the limitation had set it on 16 April 2014. Therefore, the respondent's claim was time barred as she amended her writ on 22 September 2014 which was after the lapse of six years from the date her cause of action accrued. (para 30)

E **(3)** As the respondent did not appeal against the decision of the Magistrate in striking out part of the respondent's claim for the sum of RM6,168, the respondent was taken to have accepted the said finding *ie* that her claim was time barred. The respondent could not elect to circumvent the limitation that had set in on 16 June 2014 by inserting an alternative F claim which arose from the same cause of action (which was time barred) but against different defendants. (para 35)

(4) Further, in the alternative claim, the respondent had pleaded that the cause of action against the appellants was based on *mala fide*/fraud and not under tort of contract. To insert the alternative cause of action G against the appellants in the same writ was a wrong mode as this new cause of action had not accrued to the respondent as plaintiff in the lower court on the date when the original writ and statement of claim were filed. That right on the part of the respondent must be pursued in a fresh action against the appellant as the cause of action accrued on a different H ground and arose on a different date *ie* on 27 August 2014. Since the amendment was done on 22 September 2014, and it was related back to the original writ which was dated 16 September 2014, the respondent's alternative claim in the original writ was pre-mature as at the date of filing the writ on 16 September 2014, the respondent's right of action I had not accrued until 27 August 2014. (paras 36 & 37)

(5) If the respondent were to file a separate or fresh action on grounds of *mala fide*/fraud against the appellants, then any application to strike out the respondent's action would not be entertained as the said cause of action was not time barred and there would be triable issues on that ground (*mala fide*/fraud) as parties would be required to produce evidence and submit at greater length. The respondent was unable to rebut the sole and fundamental issue relating to the limitation raised by the appellants in the suit before the lower court and herein. (paras 45 & 46)

Case(s) referred to:

Abdul Wahdi Zakaria v. Puspakom Sdn Bhd [2014] 4 CLJ 785 CA ***(dist)***

Dato Wira A Nordin Mohd Amin & 2 Ors v. Rajoo Selvappan & 9 Ors [2007] 1 LNS 70 CA ***(refd)***

Datuk Bandar Kuala Lumpur v. Pembinaan RT Sdn Bhd [2012] 1 LNS 827 CA ***(dist)***

Goh Kiang Heng v. Mohd Ali Abd Majid [1997] 4 CLJ (Supp) 320 HC ***(refd)***

Government Of Malaysia v. Mohamed Amin Hassan [1985] 1 LNS 79 FC ***(refd)***

Kuala Lumpur Finance Berhad v. KGV & Associates Sdn Bhd [1995] 1 CLJ 519 HC ***(dist)***

Lim Yoke Kong v. Sivapiran Sabapathy [1992] 4 CLJ 2219; [1992] 1 CLJ (Rep) 184 SC ***(dist)***

Mabro v. Eagle Star and British Dominions Insurance Co, Ltd [1932] All ER Rep 411 ***(refd)***

Neoh Choo Ee & Co Sdn Bhd v. Vasalamany Govindasamy & Anor [2004] 3 CLJ 321 CA ***(refd)***

Pemaju Ho Hock Lai Sdn Bhd v. Pembangunan Leong [2001] 2 CLJ 747 HC ***(refd)***

Simetech (M) Sdn Bhd v. Yeoh Cheng Liam Construction Sdn Bhd [1991] 1 LNS 105 HC ***(refd)***

Sivapiran Sabapathy v. Lim Yoke Kong [1992] 2 MLJ 381 ***(dist)***

Syarikat Kemajuan Timbermine Sdn Bhd v. Kerajaan Negeri Kelantan Darul Naim [2015] 2 CLJ 1037 FC ***(refd)***

Tenaga Nasional Berhad v. Kesang Trading Sdn Bhd & Ors [2002] 7 CLJ 200 HC ***(dist)***

Watimah Mad Kartam v. Dr KS Sarvananthar [2009] MLJU 767 ***(dist)***

Zain Azhari Zainal Abidin v. Wearne Brothers (1983) Sdn Bhd [1997] 5 MLJ 39 HC ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, s. 28(1)
Limitation Act 1953, ss. 4, 29(b)
Rules of the High Court 1980, O. 15 r. 1, O. 18 r. 19(1)(a), (b), (c), (d), O. 53
Rules of Court 2012, O. 15 r. 1, O. 18 r. 8(1)

Other source(s) referred:

English Supreme Court Practice 1985, vol 1, para 20/5-8/2, pp 338-339

For the appellants - Suria Kumar DJ Paul; M/s Suria Kumar & Co
For the respondent - Surendran; M/s Surendran & Thiru

[Appeal from Magistrate's Court; Civil No: A73KJ-424-06-2014]

Reported by Suhainah Wahiduddin

A

JUDGMENT

Noorin Badaruddin JC:

[1] The respondent filed a Civil Action No: A73KJ-424-06-2014 ("the suit") in the Magistrate Court on 16 June 2014 against the first and second defendants for special damages suffered by her in an accident between the respondent's motorcar bearing registration number AEJ 964 and the first defendant's motorcar with registration number AFL 5779 on 17 June 2008. The special damages claimed was for the sum of RM6,168.

[2] The respondent then received a letter from Messrs KH Ting & Co who was representing the first defendant. Enclosed in the said letter were documents dated 26 August 2014 informing the respondent's solicitor of the settlement of respondent's claim which was duly made before by Messrs B Mohan Raveen & Partners, the firm where the appellants were practising.

[3] Thereafter, the respondent amended her statement of claim to include the appellants as parties in the suit and they were then named as the third and fourth defendants. In the amended statement of claim, the respondent in the alternative prayed for the sum of RM1,942 against the appellants being the settlement sum received by the appellants from the insurance company which insured the first defendant.

[4] The appellants filed an O. 18 r. 19(a)-(d) application to strike out the respondent's claim on the grounds that when the amendments were made to include the appellants as parties to the suit, the limitation period of six years has set in since the date of accident which occurred on 17 June 2008.

[5] The learned Magistrate struck out part of the respondent's claim *ie*, the prayer for the sum of RM6,168 being the claim for special damages arising from the accident on 17 June 2008 on the grounds that the claim was time barred as the six year limitation period has expired on 16 June 2014. Nonetheless, the alternative claim by the respondent for the settlement sum of RM1,942 received from the insurance company by the appellants was allowed. The learned Magistrate was of the view that the cause of action for the sum RM1,942 arose after Berjaya Sompo Insurance Berhad has sent a letter dated 29 September 2008 to the appellants' firm enclosing the cheque for the said sum.

[6] The appellants appealed against the said decision. On 12 August 2015 this court allowed the appeal. The reasons for the said decision now follow.

Respondent's Objection

[7] Before going into the merit of the appeal, the respondent raised an objection on the ground that the appeal was filed not in accordance with s. 28(1) of the Courts of Judicature Act 1964 ("the CJA"). The said provision of the CJA provides:

S. 28 - Civil appeals from subordinate courts

(1) Subject to any other written law, no appeal shall lie to the High Court from a decision of the subordinate court in any civil cause or matter where the amount in dispute or the value of the subject-matter is ten thousand ringgit or less except on a question of law.

(2) ...

[8] The respondent contended that the appellants failed to identify any points of law or provisions of laws which they were relying on in the notice of appeal filed before this court. The respondent further submitted that even after the learned Magistrate gave written judgment in the supplementary appeal record, the appellants failed to file a memorandum of appeal stating the points of law which they were appealing against.

[9] The respondent relied on the case of *Zain Azhari Zainal Abidin v. Wearne Brothers (1983) Sdn Bhd* [1997] 5 MLJ 39 where the High Court held that notwithstanding whether an appeal arising from a claim of ten thousand or less arose from a decision after a full trial or against a summary judgment, no appeal shall lie if the appellant did not state the particulars of appeal in detail. In that case, no particulars regarding the question of law were stated in the notice of appeal. The High Court further held that acting as the appellate court, it could not determine whether or not the appellant's appeal involved a question of law. The High Court ruled that the appellant's failure to comply with the requirement of Form 140 of the Subordinate Courts Rules 1980 to state the detailed statement on the question of law in the notice of appeal involving a subject matter the value of which is less than RM10,000 was fatal and consequently nullified the notice of appeal.

[10] The respondent further argued that the appellants failed to state with precision as to which particular section under the Limitation Act 1953 ("the Act") that the respondent's claim was time barred. In short, the respondent submitted that the application by the appellants in the lower court itself failed to conform to the requirement of O. 18 r. 8(1) Rules of Court 2012 which stated:

8(1) A party shall in any pleading subsequent to a statement of claim pleaded specifically any matter, for example, performance, release, any relevant statute of limitation, fraud or any fact showing illegality:

(a) Which he alleges makes any claim or defence of the opposite party not maintainable;

(b) Which, if not specifically pleaded, might take the opposite party by surprise; or

A (c) Which raises issues of fact not arising out of the preceding pleading.

(2) ...

[11] In supporting her contention, the respondent also relied on s. 4 of the Act which states:

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Limitation not to operate as a bar unless specifically pleaded.

[12] It was argued that nowhere in the defence or application or the affidavits filed by the appellants stating the specific section of the Act which they were relying upon to strike out the respondent's claim. As such the C respondent contended that the learned Magistrate was right in her decision to hold that the limitation period for the settlement sum of RM1,942 received by the appellants from the insurance company was not time barred.

[13] The respondent relied on the Court of Appeal case of *Abdul Wahdi Zakaria v. Puspakom Sdn Bhd* [2014] 4 CLJ 785 where it was held that where D defence is based on limitation under the Act, an application for striking out should not be allowed until and unless limitation is pleaded based on the explicit words in s. 4 of the Act because the defence of limitation under the Act is not absolute as there are exceptions provided in the Act as well as the option to waive this defence.

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[14] The respondent also highlighted that the issue of limitation raised by the appellants could not be a ground for the court to strike out the respondent's claim. The respondent submitted that an action cannot be struck out on the ground it discloses no cause of action as statutes of limitation merely barred a plaintiff's remedy and not his cause of action. On this ground F the respondent relied on the cases of *Goh Kiang Heng v. Mohd Ali Abd Majid* [1997] 4 CLJ (Supp) 320; [1998] 1 MLJ 615 and *Pemaju Ho Hock Lai Sdn Bhd v. Pembangunan Leong* [2001] 2 CLJ 747; [2001] MLJU 189.

[15] In the case of *Goh Kiang Heng v. Hj Ali Abd Majid (supra)* Augustine G Paul JC (as His Lordship then was) held that an action cannot be struck out on the ground that it discloses no cause of action as statutes of limitation merely barred a plaintiff's remedy and not his cause of action. Whilst in *Pemaju Ho Hock Lai Sdn Bhd (supra)* Suriyadi Halim Omar J (as His Lordship then was) stated likewise; that defence of pure and simple limitation merely bars a plaintiff's remedy but not his cause of action.

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[16] As such and based on those authorities cited, the respondent submitted that the appellants could not rely on limitation alone as a ground to strike out the respondent's claim.

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Findings Of This Court

[17] Firstly, this court found that s. 28(1) of the CJA did not say that notice of appeal should expressly states the question of law. This court found no difficulties to identify from the whole appeal record that the question of law was obvious in that the appellant's application to strike out the plaintiff/respondent's claim was premised solely on the ground that the said claim was time barred. Limitation was the sole issue and that was the question of law before this court and for that matter even before the lower court.

[18] The Court of Appeal in *Neoh Choo Ee & Co Sdn Bhd v. Vasalamany Govindasamy & Anor* [2004] 3 CLJ 321 held that there is no such requirement for the appellant to expressly state the question of law in the notice of appeal. The Court of Appeal through the judgment of Gopal Sri Ram JCA stated:

> [2] Section 28(1) of the CJA does not say that the notice of appeal should expressly state the question of law. Neither does O. 49 of the SCR or O. 55 of the Rules of the High Court 1980 ('RHC'). There was thus nothing wrong with the notice of appeal lodged by the appellant with the High Court. In the circumstances, we would disagree with the learned judge that a notice of appeal in Form 140 of the SCR should set out the questions of law which the appeal involves. Points of law will normally be taken in the memorandum of appeal and it is to that document that the High Court ought to have resort.
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> [3] *Malayan Banking Bhd v. Syed Ali Mohsin* and *Mohamad Safuan Wasidin & Anor v. Mohd Ridhuan Ahmad*, which in essence held that " ... Form 140 must state at least in general form the questions of law that he wishes to appeal on were wrongly decided and should no longer be considered as good law."

[19] Likewise and pursuant to the decision of the Court of Appeal in *Neoh Choo Ee & Co Sdn Bhd v. Vasalamany Govidasamy & Anor (supra)*, this court would have to add that the decision in *Zain Azhari Zainal Abidin v. Wearne Brothers Sdn Bhd (supra)* cited by the respondent could no longer be good law as well.

[20] The notice of appeal filed by the appellants conformed to the statutory form provided by the rules of court. What was more pertinent was that the respondent was not prejudiced in any way as she could not deny the fact that limitation was the sole issue of the matter in the lower court and that the decision by the learned Magistrate was premised on the same ground. In the appellant's striking out application in the lower court, the grounds were stated as follows:

(i) Tarikh kemalangan motokar Plaintif adalah pada 17.6.2008;

(ii) Plaintif hanya membawa masuk Defendan Ketiga dan Keempat sebagai pihak dalam prosiding ini pada 22.9.2014 iaitu selepas tamat tempoh enam (6) tahun dari tarikh kemalangan;

A (iii) Tarikh luput untuk Plaintif membawa tuntutan ini adalah pada 16.6.2014; dan

(iv) Oleh yang demikian, pada tarikh Plaintif meminda Writ dan Pernyataan Tuntutan iaitu pada 22.9.2014, had masa telah pun terakru memihak kepada Defendan ketiga dan Defendan Keempat dan Plaintif tidak berhak untuk menambahkan Defendan Ketiga dan Defendan Keempat sebagai pihak dalam prosiding ini.

[21] Even without the memorandum of appeal, from the appeal record consisting of the cause papers in the lower court, the sole issue and/or the question of law was apparent, ie, the limitation period.

[22] Gopal Sri Ram JCA explained further in *Neoh Choo Ee & Co Sdn Bhd v. Vasalamany Govindasamy & Anor (supra)* at p. 330 as follows:

> The issue is whether a notice of appeal from the subordinate court should formulate the questions of law upon which the appeal turns ...
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> ... We therefore find that there is nothing wrong with the notice of appeal lodged by the appellant with the High Court. It conforms with the statutory form provided by the rules of court. It has not prejudiced the respondents in any way. Indeed they made no complaint about it in the first place. It was the High Court which took the point *suo motu*. That shows there was no prejudice. If there had been, counsel for the respondents would surely have complained. We are therefore, with respect, unable to agree with the learned judge that a notice of appeal in Form 140 of Subordinate Courts Rules 1980 should set out the question or questions of law which the appeal involves. We agree with Mr. A. Suppiah of counsel for appellant that points of law will in the usual way be taken in the memorandum of appeal and it is to that document that the High Court ought to have resort. If upon reading the memorandum of appeal and the record of appeal as a whole the High Court comes to the conclusion that the appeal does not involve a question of law, then it would no doubt deal with the point in the ordinary way, when the appeal is called on for hearing.
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> But it must be said at once in fairness to the learned judge that he was persuaded to take the view he took by two decisions of the High Court. In *Malayan Banking Bhd v. Syed Ali Mohsin* [1991] 3 CLJ 2892; [1991] 3 CLJ (Rep) 236, Lamin Yunus J (as he then was) said:
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> > I am of the view that in the case of an appellant intending to appeal on questions of law, the notice of appeal in Form 140, must state at least in general form the question or questions of law that he wishes to appeal on.
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> Again in *Mohamad Safuan Wasidin & Anor v. Mohd Ridhuan Ahmad (An Infant)* [1994] 1 LNS 186; [1994] 2 MLJ 187, Abdul Malik Ishak J expressed the following view:

> In my judgment, in the case of an appellant intending to appeal from the decision of the subordinate court where the quantum is less than RM10,000.00, the notice of appeal in Form 140 must state generally the question or questions of law that he wishes to appeal on. Any failure to conform to this basic statutory requirement would strike at the very core of the appeal and, consequently, would nullify the appeal.
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> Now it is plain that the views expressed in those two cases do not coincide with the opinion we have expressed a moment ago. In our opinion those cases were wrongly decided and should no longer be considered good law. For otherwise, the court would be imposing a condition of appeal that written law does not prescribe.

[23] On the defence of limitation pursuant to O. 18 r. 8(1) of the Rules of Court 2012, the appellants in their statement of defence had stated:

> 20. Defendan ketiga dan Defendan Keempat juga memplidkan bahawa tuntutan Plaintif ini dihalang oleh batasan had masa menurut Akta Had Masa 1953 kerana Defendan Ketiga dan Defendan Keempat hanya dinamakan sebagai pihak di dalam tuntutan Plaintif selepas enam (6) tahun daripada tarikh kemalangan.

[24] From the above excerpts of the appellants' statement of defence, the Limitation Act 1953 was specifically pleaded. This court was of the view that the defence of limitation was properly and sufficiently pleaded by the appellants in the court below and that was the premise based upon by the learned Magistrate in coming to her decision. In the case of *Abdul Wahid Zakaria v. Puspakom Sdn Bhd (supra)* cited by learned counsel for the respondent, the limitation period was not specifically pleaded in the statement of defence. The averments made in the statement of defence in that case only showed that the defendants intended to show that the plaintiff's claim was frivolous and vexatious or an abuse process of the court. The case ought to be distinguished from the present appeal before this court. The respondent in this appeal could not be said to have been taken by surprise when the appellant filed to strike out her claim on ground of limitation. In fact it was up to the respondent as plaintiff in the lower court to show that her claim was not statute-barred and ought not be struck out.

[25] In *Syarikat Kemajuan Timbermine Sdn Bhd v. Kerajaan Negeri Kelantan Darul Naim* [2015] 2 CLJ 1037; [2015] 2 AMR 124, Azahar Mohamed FCJ delivering the judgment of the Federal Court stated:

> (i) Whether limitation is sufficiently pleaded
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> [25] As a starting point, the significant point to note is that the defence of limitation was properly and sufficiently pleaded the defendant in paragraph 18 of its defence which reads:

A Defendan sekali lagi mengatakan bahawa tindakan Plaintif ini adalah dihalang oleh had masa dan Defendan berhak ke atas pembelaan tersebut di sisi undang-undang

[26] Even though the 1953 Act was not mentioned by name in the defence, it would be sufficient, in our judgment, for the defendant to aver B in the defence that the plaintiff's claim is time barred according to the law (see *Re Estate of Choong Lye Hin, decd; Choong Gim Guan v. Choong Gim Seong* [1977] 1 MLJ 96 and *Mariam bt Shaik Mohd Omar v. Ong Chin Poh* [1994] 3 MLJ 419)

[26] This court found that the respondent's objection on the technical C grounds stated above was defeated by the highest authority in *Syarikat Kemajuan Timbermine Sdn Bhd v. Kerajaan Negeri Kelantan Darul Naim (supra)* and from the cause papers the sole issue in this appeal was the question of limitation which was sufficiently and properly pleaded by the appellant.

The Appeal

D **[27]** Learned counsel for the respondent submitted that the respondent had clearly pleaded and had claimed for the sum of RM1,942. The respondent further submitted that her cause of action from the beginning has been for the total cost of repairs for the damages sustained by her motorcar and that later after amending the statement of claim, the cause of action against the E appellants was also for the same damages. Undeniably, the damages claimed arose from the accident that occurred on 17 June 2008.

[28] Learned counsel for the appellant argued that in fact, in the amended statement of claim, the respondent prayed for interest at the rate of 5% per annum against the appellants from the date of the accident. These facts F according to learned counsel for the appellants show that the respondent's cause of action arose on 17 June 2008 when her motorcar was involved in the accident on the said date. Therefore according to the appellants, since the cause of action for the respondent's accident claim arose on 17 June 2008, the limitation would have set in on 16 June 2014 making the claim of G RM1,942 by the respondent against the appellants unsustainable.

[29] In *Simetech (M) Sdn Bhd v. Yeoh Cheng Liam Construction Sdn Bhd* [1991] 1 LNS 105 Lim Beng Choon J referred to the *English Supreme Court Practice 1985* (vol. 1) para 20/5-8/2 pp. 338-339 regarding the issue of amendment made to a writ. In that case, the defendant was the main H contractor for the construction of an office building and had agreed to the plaintiff executing the sub-contract works. The plaintiff later filed a writ claiming for a sum of money for works satisfactorily done which the defendant failed to pay. The plaintiff later amended the statement of claim increasing the amount claimed based on the final adjustment of the contract

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sum as stated by the consulting engineer in the statement of final account. The court held that since the amendment related back to the date of the original pleading, no new cause of action accruing since the original pleading would be allowed. Applying this principle, the court held further that the plaintiff was not entitled to claim the additional sum of $173,659.25 which became due and payable to the plaintiff only after the date of the issue of the writ and statement of claim. Lim Beng Choon J stated:

> In considering the first issue, I would refer to the English Supreme Court Practice 1985 (Vol 1) para 20/5 - 8/2 pp 338 - 339. There it is set out that:
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> > An amendment duly made takes effect not from the date when the amendment is made out but from the date of the original document which it amends when an amendment is made to the writ, the amendment dates back to the date of the original issue of the writ and the action continues on though the amendment had been inserted from the beginning. The writ as amended becomes the origin of the action and the claim thereon indorsed is substituted for the claim originally indorsed.

[30] In this appeal, the respondent amended her claim on 22 September 2014 and the cause of action arose from the date the accident occurred on 17 June 2008. Since the cause of action arose on 17 June 2008, the limitation set in on 16 June 2014. Therefore the respondent's claim was time barred as she amended her writ on 22 September 2014 which was after the lapse of six years from the date her cause of action accrued.

[31] This court's attention was taken to O. 15 r. 1 of the Rules of Court 2012. The said order stated that a plaintiff may in one action claim relief against the same defendant in respect of more than one cause of action in certain exceptions. The said order is reproduced below:

> Joinder of causes of action (O. 15 r. 1)
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> 1. (1) Subject to rule 5(1), a plaintiff may in one action claim relief against the same defendant in respect of more than one cause of action:
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> (a) If the plaintiff claims, and the defendant is alleged to be liable, in the same capacity in respect of all causes of action;
>
> (b) ...
>
> (c) With the leave of the court

[32] This court was of the considered view that no new cause of action against a new defendant can be added in a joinder of causes of action under O. 15 r. 1 of the Rules of Court 2012 particularly when limitation has set in. Learned counsel for the appellants cited the case of *Government Of Malaysia v. Mohamed Amin Hassan* [1985] 1 LNS 79; [1986] 1 MLJ 224

where the Federal Court held that no person can be added as a party pursuant to any of the provisions of O. 15 r. 1 of the Rules of the High Court 1980, if the limitation had set in against the party proposed to be added. The Federal Court held:

> … Subsequently and after the expiry of the limitation period the respondent applied for an order to amend the statement of claim by adding himself and his wife as plaintiffs in their own personal capacity under Order 15, rule 1(4) of the Subordinate Courts Act, 1980.
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> … This is not permissible under any provision of the Order 15 rule 1, particularly when the period of limitation affecting the proposed plaintiff had expired.

[33] The decision by the Federal Court in *Mohamad Amin*'s case *(supra)* was followed in *Dato Wira A Nordin Mohd Amin & 2 Ors v. Rajoo Selvappan & 9 Ors* [2007] 1 LNS 70; [2007] 4 AMR 793. James Foong JCA delivering the judgment of the Court of Appeal held:

> [9] Since there is only one issue in this appeal concerning the defence of limitation, we wish to reiterate from the outset that if an action were to fail *in limine* upon plea of limitation against the party intended to be included in an action upon an application made under Order 15 r 1 of the Rules of the High Court (RHC) then such application should be refused - *Government of Malaysia v. Mohamed Amin bin Hassan* [1986] 1 MLJ 224 at 228.

[34] In *Mabro v. Eagle Star and British Dominions Insurance Co, Ltd* [1932] All ER Rep 411, the English Court of Appeal held that:

> The court will not allow an amendment joining a new plaintiff to a writ if the effect of so doing would be to deprive the defendants of a defence under the Statute of Limitations.

[35] The respondent then invited the court to examine her alternative claim from paras. 9-15 of the amended statement of claim. The respondent stated that her claim against the appellants was made only if the respondent's claim against the first defendant is dismissed. Based on this argument alone and looking at the claims in entirety, it was obvious that the cause of action was anchored on the accident that occurred on 17 June 2008. As the respondent did not appeal against the decision of the learned Magistrate in striking out part of the respondent's claim for the sum of RM6,168, the respondent was taken to have accepted the said finding ie, that her claim was time barred. This court was of the considered view that the respondent could not elect to circumvent the limitation that had set in on 16 June 2014 by inserting an alternative claim which arose from the same cause of action (which was time-barred) but against different defendants.

[36] Further, in the alternative claim, the respondent pleaded that the cause of action against the appellants was based on *mala fide*/fraud and not under tort or contract. The respondent highlighted that according to the exception to the limitation rule provided in s. 29 of the Act, the limitation period shall not begin to run until the plaintiff/respondent has discovered the fraud or mistake, as the case may be, or could with reasonable diligence have discovered it. In her amended statement of claim at para. 9 the respondent stated that on 27 August 2014 she discovered that the appellants through their firm had made the claim on her behalf relating to the accident and had entered into a settlement with the insurer of the first defendant. The respondent then amended her writ dated 16 June 2014 to include the claim of the said settlement sum which was averred to have been entered by the appellants fraudulently. But this court was of the considered view that to insert the alternative cause of action against the appellants in the same writ was a wrong mode as this new cause of action had not accrued to the respondent as plaintiff in the lower court on the date when the original writ and statement of claim were filed.

[37] This court agreed with the submission by learned counsel for the respondent that where the cause of action on ground of *mala fide*/fraud is concerned, the respondent was not time barred as the cause of action arose within the exception of the limitation rules under s. 29 of the Act. But that cause of action was a new cause of action and therefore that right on the part of the respondent must be pursued in a fresh action against the appellant as the cause of action accrued on a different ground and arose on a different date ie, on 27 August 2014. Since the amendment was done on 22 September 2014 and it related back to the original writ which was dated 16 June 2014, the respondent alternative claim in the original writ was pre-mature as at the date of filing the writ on 16 June 2014 the respondent's right of action has not accrued until 27 August 2014.

[38] Learned counsel for the respondent forwarded several cases to support her contentions. Nevertheless, this court distinguished those cases with the present appeal.

[39] In *Sivapiran Sabapathy v. Lim Yoke Kong* [1992] 2 MLJ 381, a decision from the High Court, (which decision was later affirmed by the Supreme Court in *Lim Yoke Kong v. Sivapiran Sabapathy* [1992] 4 CLJ 2219; [1992] 1 CLJ (Rep) 184; [1992] 2 MLJ 571), the plaintiff therein filed his claim after the expiry of six years from the date of accident since the identity of the defendant's insurer was concealed. The Supreme Court affirmed the findings made by the learned High Court Judge. The then Supreme Court held that by refusing to come forward in response to the Motor Insurers' Bureau circular letter, the reasonable conclusion from such conduct was that

A the respondent's right had been concealed by the fraud of the insurance company and as such the six year limitation period should be postponed until the respondent had discovered the fraud or could with reasonable diligence have discovered it.

B **[40]** However in the present appeal, the respondent only amended her claim to include the appellants after the respondent's cause of action, which was said to have accrued on 27 August 2014. As stated earlier, the respondent's original writ was dated 16 June 2014. The writ was amended on 22 September 2014 adding the appellants as defendants and this amendment was done based on a new cause of action. The step taken by the C respondent against the appellants was pre-mature due to the fact that the new cause of action of *mala fide*/fraud has yet to accrue on 27 August 2014.

[41] In *Kuala Lumpur Finance Berhad v. KGV & Associates Sdn Bhd* [1995] 1 CLJ 519; [1995] 1 MLJ 504, the main issue before the court was as to when the cause of action arose. The High Court agreed that the action taken D by the plaintiff therein to amend the statement of claim by stating the cause of action arose when the negligence and/or fraud by the valuer was discovered, was right. In the present appeal, there was a new cause of action after the amendment was done by the respondent in the suit and the issue was not as to when the cause of action arose.

E **[42]** *Tenaga Nasional Berhad v. Kesang Trading Sdn Bhd & Ors* [2002] 7 CLJ 200; [2002] 6 MLJ 1 was a case where a plaintiff (the purchaser) filed an action claiming money paid against the defendant (the vendor) who had fraudulently concealed the transfer of the property sold to the plaintiff earlier to another party without the knowledge of the plaintiff. The case is to be F distinguished with the present appeal as in that case, the defendant's failure to keep the plaintiff informed of the transfer of the property to another party constituted a fraudulent concealment and thus justified postponement of the limitation period within s. 29(b) of the Act. There was just one cause of action in that case and that cause of action came under the exception of G s. 29(b) of the Act.

[43] Cases of *Watimah Mad Kartam v. Dr KS Sarvananthar* [2009] MLJU 767 and *Datuk Bandar Kuala Lumpur v. Pembinaan RT Sdn Bhd* [2012] 1 LNS 827; [2013] 2 MLJ 873 did not support the respondent's case either. In the present appeal before this court the respondent claimed the limitation period H in her alternative claim was from 27 August 2014 which was after the date of the original pleading dated 16 June 2014. The new cause of action said to have accrued on 27 August 2014 cannot be included in her original claim as decided in *Simetech*'s case *(supra)*. The cases cited by the respondent involved only as to when the cause of actions arose whilst in this present I appeal, the respondent acceded that a new cause of action arose against different defendants in the suit.

[44] In *Datuk Bandar Kuala Lumpur v. Pembinaan RT Sdn Bhd* [2012] 1 LNS 827; [2013] 2 MLJ 873, the appellant applied to strike out the action filed by the respondent under O. 18 r. 19(1) of the Rules of the High Court 1980 on the grounds, *inter alia*, the respondent's claim was time barred under the Limitation Act 1953 and/or the Public Authorities Protection Act 1948 and that the claim should not have been brought by way of a writ but by way of a judicial review under O. 53 of the Rules of the High Court. The High Court dismissed the application holding the claim was not frivolous, scandalous or an abuse process of court and that there were triable issues. The Court of Appeal affirmed the said decision.

[45] This court was of the considered view, that if the respondent were to file a separate or fresh action on grounds of *mala fide*/fraud against the appellants, then any application to strike out the respondent's action would not be entertained as the said cause of action was not time barred and there would be triable issues on that ground (*mala fide*/fraud) as parties would be required to produce evidence and submit at greater length.

[46] In the upshot, the respondent was unable to rebut the sole and fundamental issue relating to the limitation raised by the appellants in the suit before the lower court and herein. The appeal was allowed with no order as to cost.